spectrum.[246] We conclude that, for the reasons discussed in the following paragraphs, designating broadband and narrowband PCS as presumptively CMRS will advance all of our goals and Congress's intent in enacting the Budget Act.

119. We agree with Bell Atlantic's suggestion that we establish a "presumption" that PCS will be classified as CMRS, allowing each PCS provider to make a showing that one or more of its services are private. We believe that the presumption approach is warranted because we have defined PCS to be broadly available to "individuals and businesses" and capable of interoperability so that it "can be integrated with a variety of competing networks."[247] PMRS services do not meet these criteria because they are not available to the public (or a substantial portion of the public) or are not interconnected to the public switched network. Therefore, a presumption that PCS should be CMRS fits our general definition of the service. All PCS spectrum will be presumed to be licensed as CMRS. An applicant or licensee proposing to use any PCS spectrum to offer service on a PMRS basis may overcome the CMRS presumption. To do so, the applicant or licensee must make a showing that must include a certification indicating that the licensee plans to offer PCS on a private basis. The certification must include a description of the proposed service sufficient to demonstrate that it is *not* within the CMRS definition. As in other licensing activities, we intend to rely on applicants' representations, and any interested party seeking to show that a licensee's request to offer PCS on a private basis does not defeat the CMRS presumption must present specific allegations of fact supported by an affidavit of a person or persons with personal knowledge.[248] If a PCS applicant who is authorized to provide only PMRS service actually provides CMRS service under that license, it will be subject to appropriate enforcement action.[249]

120. We agree with commenters that treating PCS as presumptively CMRS will advance the public interest and the underlying intent of the Budget Act. First, CMRS status for PCS will advance our goal of universality for PCS. Certain Title II obligations ensuring non-discriminatory access and fair pricing, and procedures for filing complaints against practices violating these obligations, will contribute to the universal availability of PCS because such regulations place an obligation on PCS licensees to make their service available to the public at fair prices, and the complaint process under Section 208 is available to ensure that these obligations are met.[250] No similar Title II obligations would apply if we were to designate PCS as private carriage. We also conclude that commercial mobile radio service status is consistent with our goal of achieving

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[246] *See* Communications Act, § 8(g), 47 U.S.C. § 158(g). Furthermore, our authority to issue licenses by auction under the Budget Act was conditioned on the completion of this rule making proceeding with respect to classification of PCS. *See* Communications Act, §§ 309(j)(10)(A)(iv), 332(c)(1)(D), 47 U.S.C. §§ 309(j)(10)(A)(iv), 332(c)(1)(D); *see also Auction Notice*, 8 FCC Rcd at 7655 n.110 (para. 116) (principal use of PCS spectrum is expected to involve service offerings rendered in exchange for compensation).

[247] *Broadband PCS Order*, 8 FCC Rcd at 7712 (para. 23).

[248] *See* Communications Act, § 309(d)(1), 47 U.S.C. § 309(d)(1). Because of the CMRS presumption, all PCS applications and modifications will be placed on public notice for 30 days. *See id.*, § 309(b). *See* Section 20.9(b) of the Commission's Rules, as adopted in this Order, for the procedures an applicant or licensee must follow to offer PCS as a PMRS.

[249] *See, e.g.*, Communications Act, §§ 312(a), 503(b), 47 U.S.C. §§ 312(a), 503(b).

[250] *See, e.g.*, Communications Act, §§ 201, 202, 208, 47 U.S.C. §§ 201, 202, 208 (providing for, respectively: service and interconnection upon reasonable request and terms; no unjust or unreasonable discrimination; complaint procedures to exact forfeitures for violation of these obligations); *see also Notice*, 8 FCC Rcd at 7999-8001 (paras. 56-68).

speedy deployment of PCS. We have set certain construction requirements for PCS licensees in order to ensure such quick deployment of PCS. Within their ten-year license terms, broadband PCS licensees must serve one-third of the population within their market areas within five years, two-thirds within seven years, and 90 percent within ten years after being licensed.[251] In the case of narrowband PCS, licensees will be required to cover 37.5 percent of the population of the applicable service area within five years, and 75 percent of the population within ten years.[252]

121. We believe that designation of PCS as presumptively CMRS is consistent with the strict build-out requirements we have established to ensure quick deployment of the service. The plain meaning of the words "offer service to . . . the population" in the broadband PCS build-out requirements is that broadband PCS licensees must be in a position to serve the stated percentages of population, upon reasonable request, in their service areas within the specified time. We agree with commenters who also maintain that it would be difficult for broadband PCS licensees to meet these build-out requirements on a private basis, since the requirements call for service of large percentages of population. Because we have concluded that Section 332 requires PMRS to be limited to service available to only a limited group of users in any given service area, or restricted to non-interconnected service, it would be extremely difficult for licensees to meet our PCS build-out requirements on a private basis.

122. CMRS status for PCS will not hinder our goal of promoting diverse services. The statute allows us to adopt a flexible regulatory scheme to treat certain CMRS in a streamlined fashion, thereby cultivating diversity among services.[253] Nor will regulating all PCS as presumptively CMRS necessarily deter diverse service offerings because, in the past, we have allocated spectrum for common carriage use without requiring that it be operated only under any one particular technical set of parameters.[254]

123. Also, common carriage regulation of PCS will foster competitive delivery. Congress has given us the mandate to examine the competitive aspects of commercial mobile radio service markets on an ongoing basis so that we can assure competitive conditions exist among PCS

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[251] *Broadband PCS Order*, 8 FCC Rcd at 7753-54 (paras. 132-134).

[252] *Narrowband PCS Reconsideration Order* at para. 32.

[253] In explaining the provisions of Section 332(c)(1)(A) allowing forbearance for some commercial mobile service providers, the Conference Report explains that:

> the purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Conference Report at 491.

[254] *See, e.g.*, Amendment of Parts 2 and 22 of the Commission's Rules To Allocate Spectrum in the 928-941 MHz Band and To Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, First Report and Order, 89 FCC 2d 1337, 1343 (1982) (deciding "not to earmark common carrier frequencies for any specific use").

licensees and in relation to rival services.[255] CMRS status for PCS will further accomplish Congress's intent in enacting the Budget Act by establishing regulatory symmetry among mobile service providers. In addition, statutory forbearance from many aspects of Title II common carriage regulation will enhance the efficiency and public value of PCS spectrum, advancing the nation's network infrastructure into the forefront of state-of-the-art wireless telecommunications technologies. Moreover, our rules will allow PCS providers to provide private PCS service if they demonstrate a reasonable basis for overcoming the CMRS presumption.[256] We therefore conclude that presumptive commercial mobile radio service status for PCS will advance the public interest.

E. Forbearance from Title II Regulation

1. *Statutory Test*

124. Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier.[257] The Conference Report states that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section."[258]

125. Section 332(c)(1)(A) also requires that before forbearing from applying any section of Title II the Commission must find that each of the following conditions applies:[259]

(1) Enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory.

(2) Enforcement of such provision is not necessary for the protection of consumers.

(3) Specifying such provision is consistent with the public interest.

As we discussed in the Notice, as part of evaluating the "public interest" described in Section 332(c)(1)(A)(iii), Section 332(c)(1)(C) mandates that the Commission consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service. . . ."[260] For PCS, Section 332(c)(1)(D) specifically requires the Commission to make these determinations within 180 days of enactment. While the public interest evaluation requires the Commission to look at market conditions, the statute permits us to consider other factors in deciding whether to forbear from regulating under any provision of Title II. In the Notice we

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[255] Under the Communications Act, §§ 332(c)(1)(A)-332(c)(1)(C), 47 U.S.C. §§ 332(c)(1)(A)-332(c)(1)(C), the Commission may review competitive market conditions and adopt a flexible regulatory scheme forbearing from certain regulations in order to foster competition. *See Notice*, 8 FCC Rcd at 7998-99 (paras. 53-59); *see also* Part III.E, paras. 124-219, *infra.*

[256] See para. 119, *supra.*

[257] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[258] Conference Report at 491.

[259] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[260] *Id.*, § 332(c)(1)(C), 47 U.S.C. § 332(c)(1)(C).

sought comment on what factors the Commission should consider when performing the analyses pursuant to this test.

2. *Competition in the Commercial Mobile Radio Services Marketplace*

a. Background and Pleadings

126. In the *Notice*, we tentatively concluded that the mobile services marketplace was sufficiently competitive to justify forbearance from many sections of Title II.[261] Since the third prong requires the Commission to determine the effect of forbearance on competition in the CMRS marketplace, we focus on the competitive nature of the CMRS marketplace first.

127. CTIA, Motorola, and other commenters contend that the CMRS marketplace is competitive, and becoming increasingly more so, with as many as seven PCS licensees and SMR and enhanced SMR providers joining the two cellular licensees and resellers currently operating in each market.[262] Bell Atlantic and McCaw argue that in the cellular market, the presence of two facilities-based providers, in addition to resellers, assures competitive conditions that prevent any one competitor from possessing the ability and incentive to engage in anti-competitive practices.[263] McCaw also asserts that cellular carriers lack market power.[264] Bell Atlantic and GTE contend that the Commission has long recognized that the cellular marketplace is subject to vigorous competition on both a facilities and resale basis.[265] Motorola and Mtel further argue that the paging industry is even more competitive, with 80 private and common carrier channels available in the 900 MHz band alone, supporting several thousand systems across the nation.[266]

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[261] The *Notice* did not propose to address the question of forbearance for international CMRS and we do not propose such action here. *See* note 369, *infra*.

[262] CTIA Comments at 33; Motorola Comments at 17-18. *See also* AMSC Comments at 1; Arch Comments at 11; BellSouth Comments at 26; Century Comments at 5-6; Comcast Comments at 12; GTE Comments at 15; Cox Comments at 7; McCaw Comments at 8; Nextel Comments at 21; Sprint Comments at 12; Telocator Comments at 19-20, *citing* CTIA, "The U.S. Cellular Telecommunications Industry: An Overview Analysis of Competition and Operating Economics" at 12-16 (Aug. 26, 1992).

[263] Bell Atlantic Comments at 21-24; McCaw Comments at 7-8. *See also* Southwestern Comments at 27.

[264] McCaw Comments at 9.

[265] Bell Atlantic Comments at 23-24, *citing* Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Notice of Proposed Rule Making, 6 FCC Rcd 1732, 1733 (1991); Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Report and Order, 7 FCC Rcd 4028, 4029 (1992) *(Cellular CPE Bundling Order)*; GTE Comments at 14-15, *citing Cellular CPE Bundling Order*.

[266] Motorola Comments at 18; Mtel Comments at 15 (asserting that paging is competitive, arguing that the Commission established three common carrier network paging carriers based upon a determination that such licensing was sufficient both to serve existing demand and to provide genuine competition), *citing* Amendments of Parts 2 and 22 of the Commission's Rules To Allocate Spectrum in the 928-941 MHz Band and To Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, General Docket No. 80-183, Memorandum Opinion and Order on Reconsideration (Part 2), 93 FCC 2d 908 (1983). *See also* Telocator Comments at 19.

128. New Par, citing a recent economic study, notes that cellular rates have declined in real terms since cellular's inception.[267] Pagenet contends that the number of paging subscribers has increased, and the price of pagers and paging services has declined, and that these are clear indications of the competition present in the paging market.[268] CTIA asserts that the CMRS marketplace is competitive and argues that it is well-documented that CMRS providers lack market power, *i.e.*, the ability to raise price by restricting output.[269]

129. Bell Atlantic cites to another Commission rule making in which the Commission concluded that "[i]t appears that facilities-based carriers are competing on the basis of market share, technology, service offering, and service price."[270] Mtel, Pagenet, and Telocator note that the Commission has already found other common carrier mobile licensees, which are primarily engaged in the provision of paging service, to be non-dominant in their provision of interstate services.[271] In-Flight notes that the Commission found, in establishing rules for 800 MHz air-ground service, that each air-ground service provider would face substantial competition from other air-ground service providers.[272]

130. Bell Atlantic argues that the cellular industry has experienced rapid growth, nationwide expansion of coverage, declining prices, and introduction of new technologies and services, all while cellular carriers did not file tariffs.[273] Bell Atlantic points out that the vast majority of states have decided not to regulate cellular service and many states which at one time imposed rate regulation have abandoned it based on the competitiveness of the cellular markets in their states. This, asserts Bell Atlantic, supports the Commission's tentative finding that the tariffing requirement is "not necessary."[274]

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[267] New Par Comments at 9, *citing* Cellular Competition: The Charles River Study (1992). This report found a 19 percent decline (adjusted for inflation) in rates since 1983 and a 44 percent decline in accounting and operating a cellular telephone over the same period.

[268] Pagenet Comments at 20-21, *citing* EMCI, The State of the US Paging Industry — Subscriber Growth, End-User and Carrier Trends: 1990, at 33; EMCI, The State of the US Paging Industry — Subscriber Growth, End-User and Carrier Trends: 1993, at 1, 9.

[269] CTIA Comments at 34, *citing* J. Haring & C. Jackson, Strategic Policy Research, "Errors in Hazlett's Analysis of Cellular Rents," at 1 (Sept. 10, 1993) (Haring & Jackson) ("rents in cellular telephony can only reflect scarcity of spectrum rather than market power"); Metro Mobile v. New Vector, 892 F.2d 62 (9th Cir. 1989) (cellular market is competitive).

[270] Bell Atlantic Comments at 23, *quoting Cellular CPE Bundling Order*, 7 FCC Rcd at 4029.

[271] Mtel Comments at 14; Pagenet Comments at 18-20 (paging industry is vigorously competitive, *citing* R. Ridley, 1993 Survey of Mobile Radio Paging Operators, Communications, Sept. 1993 (Ridley Survey), at 20); Telocator Comments at 19; Telocator Reply Comments at 11. *See also* Bell Atlantic Comments at 22; Motorola Comments at 18; PacTel Paging Comments at 11.

[272] In-Flight Comments at 3, *citing* Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 Bands, GEN Docket No. 88-96, Report and Order, 5 FCC Rcd 3861, 3865 (1990), *recon. denied*, 6 FCC Rcd 4582 (1991).

[273] Bell Atlantic Comments at 23.

[274] *Id.* at 24-25.

131. NCRA argues that the public does not have access to a competitive cellular market.[275] The PA PUC contends that it cannot support the Commission's finding that there is sufficient competition in the commercial mobile services marketplace.[276] NCRA contends that the Commission has not changed its classification of facilities-based cellular providers as dominant carriers. NCRA claims that cellular's dominant status, coupled with the Commission's obligation to perform a detailed review of competitive market conditions, make any conclusions about the cellular market without collecting the necessary data premature.[277] New York and PA PUC also believe that a decision to support forbearance, in consideration of the current market conditions, would be premature.[278]

132. California contends that it and consumer groups have determined that competition does not exist in the California market.[279] California further asserts that in the California cellular market many cellular operators have an ownership interest in the other competitor in the same market, and that in many cases, cellular licensees that compete in one market may be business partners in another, contributing to the market problems. California argues that there is not adequate competition in the cellular marketplace in California to ensure just, reasonable, and non-discriminatory rates. California contends that it would be premature for the Commission to forbear from regulating the rates of CMRS.[280]

133. Bell Atlantic, CTIA, and Southwestern assert that NCRA's comments repeat the same claims it presented to the Commission in the cellular resale proceeding, which the Commission rejected.[281] PacTel contends that NCRA's claims regarding competition in the cellular market are incorrect.[282] Bell Atlantic argues that wholesale rate regulation has in fact increased rates.[283] Finally, Bell Atlantic and CTIA contend that NCRA, at best, provides flawed economic support for its claims.[284]

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[275] NCRA Comments at 15-16.

[276] PA PUC Reply Comments at 14.

[277] NCRA Comments at 15-16.

[278] New York Comments at 10-11; PA PUC Reply Comments at 15.

[279] California Comments at 6.

[280] California Comments at 6-8 (at a recent legislative hearing the Public Utilities Commission of the State of California presented evidence showing that rates that were set nearly nine years ago have not fallen). *See also* MMR Reply Comments at 6 (urging the Commission not to forbear from tariff regulation for commercial mobile service providers affiliated with dominant carriers).

[281] Bell Atlantic Reply Comments at 7; CTIA Reply Comments at 8; Southwestern Reply Comments at 5-7. *See also* GTE Reply Comments at 10; Pacific Reply Comments at 8; Rochester Reply Comments at 5. Bell Atlantic asserts that the Commission's action was affirmed in sweeping language by the D.C. Circuit, which held that NCRA's "evidence [of lack of competition] falls far short" and was "thin." Bell Atlantic Reply Comments at 7, *citing* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106 (D.C. Cir. 1992).

[282] PacTel Reply Comments at 2-3. *See also* Telocator Reply Comments at 11-12.

[283] Bell Atlantic Reply Comments at 8.

[284] *Id.* at 8-9; CTIA Reply Comments at 7-8. *See also* McCaw Reply Comments at 12-13. CTIA claims that NCRA selectively quotes from a recent Government Accounting Office report that states that the GAO is unable to determine whether the cellular market is competitive. CTIA also notes that NCRA's

134. CTIA, NYNEX, and Bell Atlantic dispute the claims of California, which they argue are based only on the California market.[285] Moreover, argues CTIA, economic studies show that cellular rates are approximately 5 percent to 16 percent higher in those states that regulate cellular prices. Therefore, claims CTIA, regulation and not the lack of competition may explain the higher rates that are being complained of.[286] PacTel contends that in fact cellular rates are now lower than in the past, both in absolute terms and as adjusted for inflation.[287]

b. Discussion

135. We reached the tentative conclusion in the *Notice* that the level of competition in the CMRS marketplace is sufficient to support a decision to exercise our forbearance authority as established by Congress in the Budget Act. Based upon our review of the comments and our further examination of the issues presented, we now have made the following principal findings.

136. First, we conclude that the most prudent approach for us to follow in reaching decisions regarding forbearance in this Order must involve an examination of the prevailing climate of competition with respect to each of the various mobile services comprising the CMRS marketplace. A threshold question is whether we should treat CMRS as a single market for purposes of exercising our forbearance authority. There is disagreement in the record regarding whether commercial mobile radio services are distinct or whether they can be blended together into a single CMRS market. We conclude that, for purposes of evaluating the level of competition in the CMRS marketplace, the record does not support a finding that all services should be treated as a single market. Thus, we will proceed with an analysis that focuses on each of the various commercial mobile radio services currently offered, and about to be offered, keeping in mind that our doing so is not intended to prejudge the issue of whether, and to what extent, there is competition among these various services.

137. Second, we conclude that the record supports a finding that all CMRS service providers, other than cellular service licensees, currently lack market power. This finding, which is presented in greater detail with respect to each of the services in succeeding paragraphs, supports our conclusion that consumer interests will not be adversely affected, that economic growth will be stimulated and the general economy will benefit, and that the public interest thus will be served, by our forbearing from certain requirements in Title II of the Act that otherwise would be placed upon CMRS providers.

138. Third, in the case of cellular service, the Commission has previously acknowledged that, while competition in the provision of cellular services exists, the record does not support a conclusion that cellular services are fully competitive. We conclude here, however, that the current state of competition regarding cellular services does not preclude our exercise of forbearance authority. Although we discuss the basis for this conclusion in greater detail in our subsequent discussion of cellular service, we stress here that an important aspect of this

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reliance upon a study concerning cellular rents is also unfounded considering the report's recent refutation. CTIA Reply Comments at 8 n.15, *citing* Haring & Jackson at 1.

[285] CTIA Reply Comments at 3-5; NYNEX Reply Comments at 15-18; Bell Atlantic Reply Comments at 10. *See also* GTE Reply Comments at 10-11; Telocator Reply Comments at 11; US West Reply Comments at 14-15 (the views of California and New York concerning the state of competition are not shared by regulatory commissions in most other states).

[286] CTIA Reply Comments at 4-5. *See also* Bell Atlantic Reply Comments at 10; NYNEX Reply Comments at 16-17 (studies confirm that prices are 10 percent to 15 percent higher in markets where cellular rates are regulated, so regulation hurts consumers).

[287] PacTel Reply Comments at 4-5.

conclusion is that we have decided to initiate a further proceeding in which we will propose to establish extensive and ongoing monitoring of the cellular marketplace as a means of ensuring the forbearance action we take in this Order does not adversely affect the public interest.[288] We have noted California's concerns about regional partnerships involving cellular licensees which are competitors in some markets. These arrangements might result in the sharing of pricing information in joint marketing efforts or they might blunt incentives to compete. These arrangements will be monitored by the Commission and are subject to scrutiny under federal antitrust laws.

139. By our actions here today we have identified that CMRS providers include all cellular licensees, common carrier paging licensees and private carrier paging licensees (except those providing internal service), all wide-area SMR providers, and most SMR providers.[289] Although the cellular service market is not fully competitive,[290] these other services are competitive.

140. First, the paging industry is highly competitive.[291] A recent study found that, on average, a paging carrier faces five other paging carriers competing with it in a given market, and some face as many as nineteen.[292] The combination of high capacity, large numbers of service providers, ease of market entry, and ease of changing service providers results in paging being a very competitive segment of the mobile communications market. In the 900 MHz band alone, there are forty private paging channels, of which roughly two-thirds are licensed to private carriers, and forty common carrier channels. Additionally, there are over thirty common and private carrier paging channels in the 150 MHz and 450 MHz bands.[293] There are three nationwide common carrier paging channels. Current technology permits literally tens of thousands of pagers per market to be served by a single channel, and recent advances are increasing paging channel capacity dramatically. As a result, there is a huge capacity for paging, and relatively easy entry into this market, especially for private carrier paging providers. Paging systems are relatively inexpensive to build. The price of paging equipment and service to end users is falling. Further, the technical similarity of paging equipment, particularly within a given frequency band, along with the low prices of pagers and the ready availability of leasing arrangements, enables paging customers to move easily to the service provider of their choice.

141. Second, consider SMR licensees. Most SMR licensees provide dispatch service and many also provide mobile telephone service. Non-interconnected dispatch services are PMRS. Thus, for purposes of analyzing whether forbearance is in the public interest, the appropriate focus is on the examination of market power in the provision of CMRS, such as mobile telephony.

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[288] *See* para. 194, *infra*.

[289] One recent report estimates that by sometime in the 1990s, there will be over 7,000 800 MHz and 900 MHz SMRs using over 50,000 channels. *See* D. Fertig, Private Radio Bureau, FCC, *Specialized Mobile Radio*, at 24 (Feb. 1991).

[290] *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4028.

[291] *See* EMCI, "The State of the US Paging Industry" (1990); EMCI, "The State of the US Paging Industry" (1993).

[292] *See* Ridley Survey at 20.

[293] Additional paging capacity is available on FM subcarriers that are being used both for private and common carrier paging services under Section 73.295 of the Commission's Rules, 47 C.F.R. § 73.295.

142. The SMR service's current share of the mobile telephone market is small, particularly in comparison with cellular providers.[294] Thus, to the extent that cellular rates are reasonable and would continue to be so under a forbearance regime, one should reach the same conclusion for the provision of mobile telephony by SMR licensees.

143. Some SMRs are installing advanced digital technology and have accumulated enough spectrum under SMR licenses to compete more effectively in the mobile telephony market by offering wide-area services.[295] At least initially, however, SMR licensees face significant competitive disadvantages. First, substantially less spectrum is allocated for SMR than for cellular or PCS.[296] Second, SMR subscriber equipment costs more than cellular subscriber equipment.[297] Third, initial marketing costs for digital SMR may be greater than marketing costs for cellular operators.[298] These barriers are reflected in the significantly lower market valuations of SMR companies as compared to cellular companies.[299] Thus, we conclude that SMRs providing mobile telephone service at present do not appear to have market power in the provision of mobile telephony. Although we anticipate that PCS entry will increase competition in this area, we will continue to monitor this situation as part of our annual review of the CMRS marketplace.[300]

144. The Commission has determined that no air-to-ground service provider is dominant.[301] The Commission found that selection of an open entry plan, coupled with the

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[294] Total SMR units, which are primarily dispatch, are estimated at 1.5 million as of December 1993. Total interconnected units are estimated at 425,000 units, as compared with 13 million cellular telephones. *See* Economic and Management Consultants International, Inc., "The State of SMR & Digital Mobile Radio: 1993-1994," at 1, 105 (Dec. 1993) (EMCI SMR Report).

[295] *See* note 17, *supra*.

[296] The SMR service is allocated 14 MHz in the 800 MHz band and 5 MHz in the 900 MHz band, as compared to a total of 50 megahertz for the two cellular carriers. *See* Part 22 and Part 90 of the Commission's Rules, 47 C.F.R. Parts 22, 90. The spectrum allocated for SMR is not contiguous: it is interspersed with channels designated for Public Safety and other private radio services. This inhibits use of technologies needing wider channel bandwidths. The technical standards for the 800 and 900 MHz bands are substantially different, precluding economic use of both bands in one radio unit.

[297] EMCI SMR Report at 146; M. Carter-Lome, "An Answer to Cellular," Communications, at 29 (Sept. 1993).

[298] Merrill Lynch, "SMR in the United States: A Window of Opportunity," at 28 (Oct. 1993).

[299] For example, the price AT&T agreed to pay for McCaw shares implies a value of approximately $282 per "pop" (*i.e.*, per each member of the resident population in the geographical area involved), whereas the price MCI agreed to pay for Nextel shares implies a value of approximately $43 per pop. *See* S. Malgieri, "SMRs Becoming Hot Investment in 1990's Wireless Technology," Radio Communications Report, Sept. 13, 1993, at 21; E. Andrews, "MCI Plans Big Nextel Stake as a Move into Wireless," N.Y. Times, Mar. 1, 1994, at D1.

[300] Congress has required the Commission to "review competitive market conditions with respect to commercial mobile services and [to] include in its annual report an analysis of those conditions." Communications Act, § 332(c)(1)(C), 47 U.S.C. § 332(c)(1)(C).

[301] *See* Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 Bands, GEN Docket No. 88-96, Report and Order, 5 FCC Rcd 3861, 3865 (1990), *recon. denied*, 6 FCC Rcd 4582 (1991).

competitive pressure created by multiple airlines seeking quality service at low prices, supported streamlined regulation of air-to-ground service providers.[302]

145. Finally, the record on the degree of competition is less clear for cellular service than for the other services in the CMRS marketplace. As indicated earlier, the Commission classified cellular carriers as dominant in a previous proceeding, although it did not engage in a market analysis at that time. The Commission has in the past found, however, that cellular providers face sufficient competition and that it therefore is in the public interest to relax some Commission policies traditionally applied to non-competitive markets.[303]

146. There are two facilities-based providers of cellular service in each geographic market segment. The fact that there are only two carriers raises the question of the extent to which these duopoly providers are able to reach an implicit or explicit agreement not to compete vigorously with one another and thus to elevate rates above their competitive levels. Standard principles of economics indicate that duopolists may be able to sustain what is in effect a shared monopoly — with the attendant elevated prices — either by tacitly agreeing not to price aggressively or by restricting the amount or rate of investment in new capacity. On the other hand, there are reasons that it may be difficult or unprofitable for cellular providers to coordinate their actions in this manner.

147. One limit on the profitability of collusion is provided by competing services. Hence, a key issue is the extent to which other services, such as paging and landline telephone service, compete with cellular. While an increase in the price of cellular services surely will induce some consumers to switch to the use of pagers or a landline service, the degree of cross-price elasticity has not been established in this record.

148. In addition to actual competition today, the threat of potential competition in the future may also affect current cellular pricing and investment. In the near future, there will be up to seven broadband PCS providers in each geographic area. Moreover, narrowband PCS services may compete with cellular to some extent. Since this additional competition will not be a reality for some time, it imposes no direct constraint on current pricing behavior. Nevertheless, impending competition can make any collusive pricing or capacity constraints more difficult to sustain today. The approaching increase in competition may limit the ability, and profitability, of attempts to restrict cellular investment today because today's investments can have significant impacts on the profits that will be earned in the face of PCS competition. A cellular provider may invest in additional capacity now in anticipation of gaining advantage in the coming competitive environment,[304] rather than to restrict output through tacit or explicit collusion with a fellow duopolist.

149. Other factors may also limit a cellular carrier's ability to reach tacit agreements. Rapid changes in the nature of the product can make collusion difficult. For example, one report has determined that quality competition is high, with cellular licensees working to develop techniques that reduce interference and decrease the number of blocked or dropped calls. Price competition has led to equipment discounts to customers of amounts between $100 and $450

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[302] *See id.*

[303] *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4028-29. The Commission found that the cellular market was sufficiently competitive to permit cellular service providers to bundle cellular CPE as long as they did not specifically tie the provision of service with CPE. The Commission recognized that other market characteristics made this bundling in the public interest.

[304] This result may be particularly likely for a service such as cellular telephony, where system ubiquity and capacity (and the resulting blockage rates) are an element of service quality.

when new customers initiate cellular service.[305] Complex pricing structures, such as are used in the cellular industry, make it difficult for a carrier to sustain collusive pricing.[306]

150. As discussed above, commenters offer a variety of arguments and pieces of data that they believe demonstrate the extent of competition. We found none of these analyses to be determinative. CTIA and New Par, citing the same study, point to declines in the real price of cellular services as indicative of competition. This argument is, however, incomplete. It is critical to understand the reason why prices have been falling. For example, even a monopolist may lower its prices as it lowers costs or increases its capacity. Moreover, if prices are continuing to fall, does this logic imply that the markets are not fully competitive? Before reaching a conclusion about the state of competition, one must explain why cellular prices have been falling. Those who allege that prices are falling mainly because of competition do not support that claim with adequate evidence.[307] Similarly, some commenters point to improvements in service quality as evidence of competition. Again, however, one must understand the forces underlying the quality improvements before concluding that vigorous competition is the driver.

151. Some might argue that capacity constraints (rather than the exercise of market power) are what drives quantities, and thus market power has not been a problem. But to be complete explanations, these analyses must account for the fact that capacity is the result of investment choices made by the carriers themselves. As already discussed,[308] a possible theory of collusion in these markets is that firms restrict their capacity levels below competitive levels but then fully utilize that capacity that they have put in place.

152. Cellular systems in some markets have reached their current capacities. Since there is no more spectrum available to allocate for cellular systems, many of the systems have reduced cell size and improved antenna design in order to maximize frequency reuse. Consequently, the only way capacity can be further increased is by converting to digital technology. The two competing digital technologies that are being implemented are time division multiple access (TDMA) and code division multiple access (CDMA). Southwestern Bell Mobile Systems has commercial TDMA systems operating in the Chicago and Dallas-Fort Worth markets.[309] Pactel Corp. and US West New Vector are actively testing CDMA systems. A recent press report indicated that Pactel Corp. will spend about $250 million during the next five years to launch digital cellular systems in California and Georgia using CDMA infrastructure equipment.[310] It has also been reported that US West New Vector will deploy CDMA service in Seattle next

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[305] *See* Affidavit of J. Hausman, *United States v. W. Elec. Co., Inc.*, Civil Action No. 82-0192, at 12-13 (July 29, 1992) (Hausman Affidavit). In order to obtain equipment discounts, it is often necessary for the customer to commit to service with a particular licensee for a minimum length of time. The Commission has found that, on balance, these arrangements are pro-competition and in the public interest. *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4029.

[306] *See* Hausman Affidavit at 12-13.

[307] In a recent *ex parte* presentation, NCRA argues that prices for cellular service to low volume end users are rising. *See Ex Parte* Letter, CC Docket No. 93-252, from D. Gusky, Executive Director, NCRA, to Chairman R. Hundt, FCC, Jan. 24, 1994.

[308] *See* para. 146, *supra*.

[309] *See* Telocator Bulletin, "Southwestern Bell Mobile Cuts Over TDMA Service in Dallas/Fort Worth," at 8, Jan. 21, 1994.

[310] *See* Radio Communications Report, "PacTel Plans To Take CDMA into California and Georgia," at 17, Jan. 31, 1994.

year.[311] This addition of more capacity tends to support the conclusion that cellular service is competitively provided, but the record does not provide clear evidence on whether investment is above or below the competitive level.

153. Bell Atlantic and CTIA argue that regulation of cellular carriers may, in fact, cause higher prices. In order to reach a proper finding that regulation causes higher prices, one must address the alternative hypothesis that partially effective regulation is put into place in those states that would otherwise have had the highest prices by an even greater margin. What explains why some states have regulation and others do not? Again, the record in this proceeding is silent on this point.

154. In summary, the data and analyses in the record support a finding that there is some competition in the cellular services marketplace. There is insufficient evidence, however, to conclude that the cellular services marketplace is fully competitive.

3. *Classes of Commercial Mobile Radio Services*

a. Background and Pleadings

155. Section 332(c)(1)(A) of the Act provides that the Commission may specify certain provisions of Title II as inapplicable to a "service or person."[312] In the *Notice* we tentatively concluded that the Commission has the authority to establish classes or categories of CMRS. The Conference Report indicates that Congress intended to provide this flexibility, but did not mandate such differential regulation.[313] In the *Notice* we tentatively concluded that potential classes might include: existing common carrier mobile services; certain PCS services; and certain private mobile radio services. We sought comment regarding whether we should promulgate regulations that vary among these classes and among different service providers within a class.

156. Most commenters argue that there is no justification for differential treatment of CMRS providers.[314] These commenters contend that CMRS are very competitive and, with the advent of PCS, any given area will have two cellular providers, up to seven PCS providers, and one or more SMRs.[315] McCaw and others aver that in changing Section 332, Congress sought

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[311] *See* Telocator Bulletin, "US West New Vector Completes Calls on Qualcomm CDMA Phone," at 8, Jan. 21, 1994.

[312] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[313] Conference Report at 491 ("Differential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section.").

[314] *See* Bell Atlantic Comments at 21; BellSouth Comments at 26; CTIA Comments at 31; Century Comments at 3; GTE Comments at 17; McCaw Comments at 5-6; New Par Comments at 3; Pacific Comments at 15; Pactel Comments at 16; Southwestern Comments at 25-26; TDS Comments at 19; USTA Comments at 11; US West Comments at 29; US West Reply Comments at 15. US West contends that, at most, the Commission might consider establishing submarkets for one-way services (paging and narrowband PCS) and two-way services (cellular, wide-area SMRs, and broadband PCS). US West notes, however, that such categories may not survive long, given the rapid developments in technology. *Id.* at 28-29. *See also* PageMart Reply Comments at 10.

[315] *See, e.g.*, Pacific Comments at 15; AT&T Reply Comments at 1-2; CTIA Comments at 33. *See also* McCaw Comments at 6-7 (penetration levels of cellular, paging, and other mobile services are low relative to the potential of wireless communications).

to promote regulatory parity.[316] McCaw contends that the differences among CMRS providers are insufficient to justify dissimilar treatment because no mobile service operator has an entrenched, controlling position in the marketplace.[317] New Par argues that differential regulation among CMRS providers would create artificial market forces that would only hinder "the competitive push and shove of the marketplace."[318]

157. Bell Atlantic contends that the appropriate level of forbearance may vary depending on whether the particular service provided is competing with local exchange service, access service, or interexchange service. Bell Atlantic wants us to forbear from regulating all CMRS providers who vigorously compete in providing local service. In contrast, Bell Atlantic argues that, because interexchange competition is minimal, the Commission should not forbear from regulating AT&T's interexchange services. Bell Atlantic asserts that AT&T's planned acquisition of McCaw makes it essential to retain tariffing requirements on AT&T's provision of CMRS.[319]

158. AT&T replies that its current interexchange services are subject to intense competition. Therefore, argues AT&T, it would not be able to cross-subsidize its CMRS affiliates by extracting higher rates for its already competitive wireline services.[320] Finally, asserts AT&T, even after its merger with McCaw, interexchange services will be strongly competitive and CMRS providers will face competition from multiple providers.[321]

159. Some commenters suggest that certain commercial mobile radio services should be subject to differential regulation based upon their ability to exercise market power, or based upon the amount of bandwidth allocated to such services, or both.[322] Nextel argues that the Commission should adjust the application of Title II to assure that new entrants, such as wide-area SMRs, have a legitimate opportunity to become effective competitors.[323] In-Flight argues that an air-to-ground service provider affiliated with a dominant carrier should remain subject to existing Commission regulations governing competitive communications services to help ensure that a dominant carrier does not unfairly use its market power in other markets to impede

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[316] McCaw Comments at 5-6. *See also* Southwestern Comments at 26; TDS Comments at 19; US West Comments at 29.

[317] McCaw Comments at 6-7; McCaw Reply Comments at 7-13.

[318] New Par Comments at 4-5. *See also* CTIA Comments at 31; CTIA Reply Comments at 11.

[319] Bell Atlantic Comments at 28-30 (AT&T and McCaw should not be permitted to bundle local and long distance service together to sell to customers).

[320] AT&T Reply Comments at 2.

[321] *Id.* at 1-3.

[322] *See, e.g.*, Telocator Comments at 13-15; Arch Comments at 10 (maintain like treatment within the narrowband and broadband classes); New York Comments at 9-10 (ensure greater oversight for dominant versus non-dominant classes; since no PCS licenses issued yet, no forbearance for PCS providers); CenCall Comments at 4-5; Nextel Comments at 22; PA PUC Reply Comments at 14-15. *See also* AMTA Reply Comments at 5-6 (arguing that it is premature to conclude that all commercial mobile services should be regulated identically).

[323] Nextel Comments at 22; Nextel Reply Comments at 10-11 (arguing that McCaw's denial of its competitive advantage is at odds with McCaw's opposition to the lifting of the MFJ prohibition on BOC provision of interLATA services).

competition in the air-to-ground market.[324] Grand urges that all existing public electronic data interchange value added network (EDI VAN) operators should be classified as dominant carriers, subject to the Commission's Open Network Architecture (ONA) requirements.[325]

160. NABER proposes that we create two types of CMRS providers: Commercial I (paging, traditional SMR, for-profit two-way radio) and Commercial II (cellular, wide-area SMRs, and PCS). Commercial I providers, according to NABER, are non-dominant and therefore would get the benefit of Title II forbearance. Carriers in the second group would not receive forbearance treatment because they have market power.[326]

161. CTIA and CenCall refute claims that any provider or group of providers possesses market power sufficient to justify differential treatment.[327] CTIA contends that NABER's proposed disparate treatment of commercial mobile radio services is unnecessary and might threaten the growth of the commercial mobile radio services market. Similarly, argues CTIA, disparate treatment based upon bandwidth is unfounded.[328]

b. Discussion

162. Congress granted the Commission the flexibility to identify different classes of CMRS for purposes of determining whether to forbear from Title II regulation.[329] In the *Notice*, we identified common carrier mobile services, certain PCS services, and certain private mobile services as existing services likely to be classified as CMRS.[330] The major policy reason to establish different categories of CMRS is the possibility that one carrier or class of carriers has market power that requires continued Title II regulation to protect consumers or the public interest. There might also exist other reasons that necessitate differential treatment. Section 332 empowers the Commission to make such a distinction at any time if it becomes necessary to do so. At this time, however, differential tariff and exit and entry regulation of CMRS as a general matter does not appear to be warranted.[331] We will, however, continue to monitor actively the cellular services marketplace.[332] In addition, because we recognize that

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[324] In-Flight Comments at 4, *citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873, 3033-37, 3051-53 (1989).

[325] Grand Comments at 8. Grand also argues that all cellular carriers should be regulated as dominant carriers. *Id.* at 7-8.

[326] NABER Comments at iii, 14-15, App. A at 1, 4-5; NABER Reply Comments at 2-5.

[327] CTIA Reply Comments at 11; CenCall Reply Comments at 3-5 (NABER offers no economic, market, or legal support for its proposals and did not consult with CenCall, a group it represents); Nextel Reply Comments at 11-12 (NABER offers no empirical data, economic studies, or other support for its proposals).

[328] CTIA Reply Comments at 10-12.

[329] *See* Conference Report at 491.

[330] *Notice*, 8 FCC Rcd at 7999 (para. 55).

[331] We note that Grand has not demonstrated any basis for our determining that an electronic data interchange value added network (EDI VAN) is a mobile service. Thus, Grand's request that we classify all existing public EDI VANs as dominant is outside the scope of this proceeding.

[332] *See* para. 194, *infra.*

differential regulatory treatment of different classes of CMRS providers may become warranted because of rapidly changing circumstances in the CMRS marketplace, we have decided to initiate a rule making in the near future to examine more specifically whether such differential treatment should be established. A principal focus of this rule making will be the question of whether we should adopt further forbearance actions under Title II of the Act in the case of certain carriers or specified classes of CMRS providers. Further, as we discuss below, we will still retain certain non-structural safeguards for the CMRS affiliates of a dominant landline carrier as well as existing structural safeguards for cellular affiliates of the Bell Operating Companies. We will review these safeguards in the future and remove them if they become unnecessary.[333]

163. We will not address here the issue of what special conditions we may need to impose upon AT&T if the proposed merger between AT&T and McCaw is consummated. Such issues are best left to the Order addressing transfer of control issues or, if necessary, rule making proceedings conducted subsequent to any grant of the pending transfer application.

4. *Forbearance from Particular Title II Sections*

164. The three prongs of the test contained in Section 332(c)(1) must be satisfied before the Commission may exercise its forbearance authority. As discussed in detail below, we have determined that forbearance from enforcing sections of Title II is appropriate where filing and other regulatory requirements would be imposed on CMRS providers without yielding significant consumer benefits. We were particularly concerned with those instances where application of Title II regulations may impede competition. We have decided that forbearance from enforcing provisions related to the complaint remedy, as well as sections containing specific consumer-related provisions, is not justified under the statutory test. We will retain our authority to invoke certain reporting requirements if necessary, and we intend to initiate a review of the cellular marketplace pursuant to this prerogative. We note that we do not intend, by our actions herein, to impose any unwarranted burdens upon private carriers who, pursuant to this Order, find themselves classified as CMRS providers. As described above, we will soon issue a Further Notice of Proposed Rule Making to consider whether further forbearance action is appropriate.[334]

a. Sections 203, 204, 205, 211, and 214

(1) *Background and Pleadings*

165. In the *Notice* we tentatively concluded that we should forbear from enforcing Sections 203, 204, 205, 211, and 214. Section 203 requires common carriers to file a schedule of rates and charges for interstate common carrier services. Section 204 gives the Commission the power to investigate a common carrier's newly-filed rates and practices and to order refunds, if warranted. Section 205 enables the Commission to investigate existing rates and practices and to prescribe rates and practices if it determines that the carrier's rates or practices do not comply with the Communications Act. Section 211 requires common carriers to file with the Commission copies of certain contracts with other carriers. Section 214 is the market entry and

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[333] *See* Part III.E.5, paras. 214-219, *infra*. Of course, there are mobile service providers that are subject to regulation under other sections of the Act and the Commission's Rules. *See, e.g.*, Part 22 of the Commission's Rules, 47 C.F.R. Part 22.

[334] *See* note 33, *supra*.

exit provision, which requires the carriers to seek Commission approval when adding or removing a line.[335]

166. Most commenters argue that because of the competitive nature of the mobile services market, the Commission should adopt a policy of maximum regulatory forbearance.[336] In addressing the statutory test for forbearance, McCaw and other commenters assert that the charges, practices, classifications, or regulations associated with particular mobile services or imposed by particular providers are likely to be just and reasonable and not unjustly or unreasonably discriminatory.[337] McCaw contends that, because cellular carriers lack market power, and sufficient other safeguards exist, such as the continued applicability of Sections 201, 202, and 208, discretionary imposition of Title II requirements is not necessary to protect consumers.[338]

167. McCaw, Century, and other commenters also insist that forbearance from Title II regulation of CMRS providers will promote the public interest.[339] Bell Atlantic concurs, arguing that the cellular industry's rapid growth, nationwide expansion of coverage, declining prices, and introduction of new technologies and services, all while carriers did not file tariffs, demonstrate that tariffing is "not necessary" and that forbearance would be consistent with the public interest.[340] McCaw argues that detailed tariff filing requirements impose substantial competitive costs without providing consumers with any offsetting benefits.[341]

168. As discussed above,[342] commenters argue that in light of the competitive nature of the CMRS marketplace, forbearance from enforcing the tariff filing obligations of Section 203

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[335] For purposes of this proceeding, we will assume that Section 214 applies to radio-based services. *But see* Transamerican Microwave, Inc., Memorandum Opinion and Order, 10 Rad.Reg. (P&F) 2d 975 (1967).

[336] *See, e.g.*, AMSC Comments at 1; AMSC Reply Comments at 1-2; Bell Atlantic Comments at 20-23; Bell Atlantic Reply Comments at 6-11; CTIA Comments at 25; McCaw Comments at 7-10; McCaw Reply Comments at 3-7.

[337] McCaw Comments at 7-8. *See also* In-Flight Comments at 3 (air-to-ground market is intensely competitive, so marketplace forces will ensure that charges and other practices are reasonable).

[338] McCaw Comments at 9; CTIA Comments at 29-30, 34.

[339] McCaw Comments at 10; Century Comments at 5; Saco River Reply Comments at 4-6.

[340] Bell Atlantic Comments at 23.

[341] McCaw Comments at 10, *citing* Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Report and Order, 7 FCC Rcd 8072, 8079 (1992); CTIA Comments at 26-27. *See also* CenCall Comments at 8, *citing Competitive Carrier Further Notice*, 84 FCC 2d at 478-79 (para. 87); Telocator Comments at 20 (Commission has determined that tariff regulation of a competitive market will actually inhibit competition, innovation, market entry, and flexibility, *citing* Tariff Filing Requirements for Non-Dominant Carriers, CC Docket No. 93-36, 8 FCC Rcd 6752 (1993); Erratum, No. 34716, CC Docket No. 93-36, 58 Fed. Reg. 48323 (Sept. 15, 1993)).

[342] *See* para. 130, *supra*.

is in the public interest.[343] Motorola contends that the imposition of Title II requirements, such as tariffing, would disserve the public interest.[344]

169. NCRA, New York, and the PA PUC believe that a decision to forbear from tariff regulation of PCS providers is premature.[345] NCRA also asserts that the Commission should not exercise its forbearance authority unless the evidence it relies on is "indisputable and compelling."[346] Further, NCRA indicates that the Commission has not reversed its policy of classifying facilities-based cellular providers as dominant carriers.[347] NCRA argues that at least the regulation of wholesale rates in the competitive mobile services markets, and in particular the cellular market, is required for the foreseeable future.[348]

170. NCRA argues that while forbearance as to retail rate regulation is acceptable, the Commission should not forbear from applying Section 203 to wholesale rates of commercial mobile radio services.[349] California, New York, and the PA PUC oppose tariff forbearance, claiming that there is insufficient competition to justify forbearing from Section 203.[350]

171. Bell Atlantic argues that some of these provisions, *i.e.*, Sections 204 and 205, merely duplicate enforcement powers the Commission will retain under Section 208 and its general powers under the Communications Act.[351] CenCall asserts that if the Commission forbears from enforcing Section 203, which CenCall supports, the Commission should also

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[343] *See, e.g.*, AMSC Reply Comments at 1-2; Bell Atlantic Comments at 20-23; Bell Atlantic Reply Comments at 6-10; BellSouth Comments at 29; CTIA Comments at 25; GCI Comments at 3; GCI Reply Comments at 1; NYNEX Comments at 18-19; NYNEX Reply Comments at 14-15.

[344] Motorola Comments at 18.

[345] NCRA Comments at 14-15; New York Comments at 10-11; PA PUC Reply Comments at 15 (any tentative conclusion with regard to the competitive market conditions in the cellular marketplace without an effort to collect the necessary data, would be premature, if not a clear abdication of congressionally mandated duty). *See also* California Comments at 7-8.

[346] NCRA Comments at 15 & n.10, *citing Cellular CPE Bundling Order*, 7 FCC Rcd at 4029; GAO, Concerns About Competition in the Cellular Telephone Service Industry, July 1992. *See also* NCRA Comments at 15-16 (in recognition of Congress's recent amendment to Section 332(c)(1)(C), Commission should perform a detailed review of competitive market conditions with respect to commercial mobile services).

[347] *Id.* at 15-16, *citing Competitive Carrier, Fifth Report*, 98 FCC 2d at 1201 n.41.

[348] *Id.* at 16. NCRA claims that it does not object to forbearance of retail rate regulation if resellers have (1) access to cost-based rates for only those basic bottleneck services that they are forced to obtain from a facilities-based cellular carrier; and (2) an efficient, timely, and effective means of enforcing access to such rates is available at the Commission. NCRA asserts that such means, short of filing tariffs with all supporting data, are within the Commission's power. *Id.* at 17-18.

[349] *Id.*

[350] California Comments at 5-6; New York Comments at 10-11; PA PUC Reply Comments at 14-16.

[351] Bell Atlantic Comments at 27. *See also* TRW Reply Comments at 22-23 ("The anticipated level of competition in the MSS/RDSS field makes Title II regulation of this new service area particularly unnecessary.").

forbear from Sections 204 and 205, which "go hand-in-hand" with the Section 203 tariff requirement.[352]

172. Bell Atlantic and others insist that Sections 211 and 214 burden carriers with paperwork which would be irrelevant once tariffs are not accepted.[353] GTE argues that since competitive market conditions make tariffs unnecessary, the filing of contracts required by Section 211, is also unnecessary.[354] BellSouth contends that on its face, Section 214 applies to communications by wire only and is inapplicable here.[355] CenCall avers that enforcement of Section 214 is unnecessary, since there is no monopoly provider.[356]

(2) *Discussion*

173. As we discussed in the Notice, in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs. The Commission determined in *Competitive Carrier* that non-dominant carriers are unlikely to behave anti-competitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in the loss of customers.[357]

174. Concerns about the ramifications of tariff forbearance are unwarranted. Despite the fact that the cellular service marketplace has not been found to be fully competitive, there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings. As we discussed above, most CMRS services are competitive.[358] Competition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore, enforcement of Section 203 is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.

175. We have concluded that although the record does not support a finding that the cellular services marketplace is fully competitive, the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements. We reach this conclusion for three reasons. First, cellular providers do face some competition today, and the strength of competition will increase the near future. Second, the continued applicability of Sections 201, 202, and 208 will provide an important protection in the event there is a market

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[352] CenCall Comments at 9-10. *See also* GCI Comments at 3.

[353] Bell Atlantic Comments at 27; GTE Comments at 14; McCaw Comments at 8. *See also* In-Flight Comments at 4 (since 800 MHz air-ground service is a competitive market, enforcement of these provisions is not necessary to protect consumers because marketplace forces will provide the consumer protection these sections were designed to provide).

[354] GTE Comments at 17.

[355] BellSouth Comments at 29-30.

[356] CenCall Comments at 10-11, *citing Competitive Carrier, Further Notice*, 84 FCC 2d at 490 (para. 117).

[357] *Competitive Carrier Notice*, 77 FCC 2d at 334-38; *Competitive Carrier, First Report*, 85 FCC 2d at 31.

[358] *See* Part III.E.2, paras. 126-154, *supra*.

failure. Third, tariffing imposes administrative costs and can themselves be a barrier to competition in some circumstances.

176. Compliance with Sections 201, 202, and 208 is sufficient to protect consumers. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act. Although we will forbear from enforcing our refund and prescription authority, described in Sections 204 and 205, we do not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages.

177. Finally, in light of the fact that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates, forbearing from applying Section 203 of the Act to CMRS providers is consistent with the public interest for a number of reasons. In a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings.[359] Second, tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level.[360] Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated,[361] since publicly filed tariffs facilitate monitoring. Third, tariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition. Finally, forbearance will foster competition which will expand the consumer benefits of a competitive marketplace. The absence of tariff filing requirements and the attendant notice periods should promote competitive market conditions by enabling CMRS providers to respond quickly to competitors' price changes. Carriers will be motivated to win customers by offering the best, most economic service packages. In this context, with the near-term growth of competition, it is reasonable to conclude, as required by Section 332(c)(1)(C), that forbearance at this time will "promote competitive market conditions" and will enhance competition among CMRS providers. Conversely, retaining tariffs under these conditions may limit competition. In light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers, as well as other CMRS providers, is in the public interest.

178. Even permitting the filing of tariffs, in the case of non-dominant carriers in competitive markets, is not in the public interest. As discussed above, we concluded that in a competitive environment, requiring tariff filings can inhibit competition. Indeed, even permitting voluntary filings would create a risk that competitors would file their rates merely to send price signals and thereby manipulate prices.[362] By refusing to accept these tariff filings we prevent

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[359] This result is supported by an earlier Commission decision. In the *Sixth Report* of the *Competitive Carrier* proceeding the Commission concluded that prohibiting non-dominant carriers from filing tariffs for interstate services would serve the public interest. *Competitive Carrier, Sixth Report*, 99 FCC 2d at 1029-30. We determined that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates. *Id. See also Competitive Carrier, Further Notice*, 84 FCC 2d at 454.

[360] *See Competitive Carrier, Sixth Report*, 99 FCC 2d at 1029-30.

[361] Of course, the requirements of Section 202(a) of the Act remain intact.

[362] Further, tariffs would add an unnecessary cost to the Commission's administration of the CMRS marketplace.

carriers from hiding behind their tariffs to avoid reducing their rates. To avoid the introduction of these anti-competitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under Section 201(b) of the Act, we will not accept the tariff filings of CMRS providers.[363] Those CMRS providers with tariffs currently on file for domestic CMRS services must cancel those tariffs within 90 days of publication of this *Order* in the Federal Register.

179. Specifically, we will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers. We also will temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service. At this time, because of the presence of competition in the CMRS market, access tariffs seem unnecessary. We recognize, however, that there may be other public interest factors that would make forbearance with respect to interstate access service inappropriate. As such, we will look at this question in more detail in proceedings addressing interconnection issues and equal access.[364] The revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates. Thus, our decision to forbear from requiring the filing of federal (*i.e.*, interstate) tariffs has no impact on those services. States may require CMRS providers to file terms and conditions for their intrastate services and, of course, states may petition the Commission to regulate intrastate commercial mobile service rates.[365]

180. Sections 204 and 205 of the Act aid in the enforcement of tariff regulation. Sections 204 and 205 provide the method of redress in the event that tariffs contain unreasonably discriminatory rates or practices. Since we have determined that we may forbear from enforcing Section 203, forbearance from enforcing Sections 204 and 205 is unlikely to injure consumers and is in the public interest. Moreover, the oversight provisions in these sections duplicate the enforcement powers the Commission will retain in Section 208 and our general powers under the Communications Act. Therefore, we forbear from regulating pursuant to Sections 204 and 205 for commercial mobile radio services.

181. Section 211 of the Act requires that copies of certain contracts with other carriers be filed with the Commission. Because we have found that competition among commercial mobile radio services is sufficient to justify forbearing from requiring tariffs, it is unlikely that contracts will contain unreasonably discriminatory rates or regulations. Therefore, we conclude that consumers will not be harmed if we forbear from the contract filing provisions of Section 211. Competitive market forces will ensure that inter-carrier contracts will not be used to harm consumers. In the unlikely event that they contain provisions that violate Section 201 or Section 202, these contracts can be obtained in the course of a Section 208 complaint proceeding. Therefore, Section 211 forbearance is in the public interest.

182. We will also forbear from exercising our Section 214 authority.[366] Section 214 requires that certain carriers submit applications to the Commission for the provision of new

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[363] The Court of Appeals for the District of Columbia Circuit reversed the Commission's earlier Order requiring carriers to withdraw their existing tariffs, finding that such action was inconsistent with Section 203(a) of the Act. MCI v. FCC, 765 F.2d 1186, 1193-94 (D.C.Cir. 1985). This decision has been superseded by the legislative changes made to Section 332 giving the Commission discretion as to the continuing applicability of Section 203 to CMRS providers.

[364] *See* paras. 236-238, *infra*.

[365] *See* Budget Act, § 6002(c)(2)(A).

[366] *See* note 335, *supra*.

facilities or the discontinuance of existing facilities.[367] One purpose of Section 214 is to protect ratepayers who are captives of monopoly communications service providers from paying for unnecessary or unwise facilities construction and to prevent a dominant carrier from discontinuing needed services where an adequate substitute is unavailable.[368] In *Competitive Carrier*, the Commission recognized that, in a competitive market, application of Section 214 could harm firms lacking market power since certification procedures can actually deter entry of innovative and useful services, or can be used by competitors to delay or block the introduction of such innovations. The presence of Section 214 barriers to exit may also deter potential entrants from entering the marketplace. The Commission also recognized that the time involved in the decertification process can impose additional losses on a carrier after competitive circumstances have made a particular service uneconomic and, if adequate substitute services are abundantly available, the discontinuance application is unnecessary to protect consumers. This analysis is equally applicable to the CMRS marketplace. We conclude that exercise of our Section 214 authority is unnecessary to ensure against unreasonable charges and practices, or to protect consumers, and that forbearance will better serve the public interest by avoiding the social costs identified in this paragraph.[369]

b. Sections 206, 207, 209, 216, and 217

(1) *Background and Pleadings*

183. Sections 206 (Liability of Carriers for Damages), 207 (Recovery of Damages), and 209 (Orders for Payment of Money) are provisions associated with the complaint remedy described in Section 208, from which the Commission may not forbear under the terms of the Budget Act. In the *Notice* we tentatively concluded that there was no record to support forbearance from enforcing any of these sections for any CMRS provider and that forbearance would not be consistent with the public interest. In the *Notice*, we tentatively concluded that there was no record to support the Commission's forbearing from enforcing Sections 216 (Application of Act to Receiver and Trustees) and Section 217 (Liability of Carrier for Acts and Omissions of Agents) for any CMRS provider and that forbearance would not be consistent with the public interest.

184. All parties that submitted comments on this issue agree that the Commission should not forbear from enforcing Sections 206, 207, and 209.[370] GCI argues that these provisions relate to the complaint process.[371] GCI also asserts that Congress intended for all providers to comply with sections relating to the complaint process.[372]

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[367] *Competitive Carrier, Second Report*, 91 FCC 2d at 65.

[368] *See Competitive Carrier, Further Notice*, 84 FCC 2d at 489.

[369] We decline to act at this time on the Motorola suggestion that we issue a Notice of Proposed Rule Making proposing forbearance for international commercial mobile radio services. *See* Motorola Comments at 17.

[370] GCI Comments at 3; Mtel Comments at 17-18; Nextel Comments at 22; NYNEX Comments at 21; PA PUC Reply Comments at 16; Pacific Comments at 17; Southwestern Comments at 29; Sprint Comments at 13.

[371] GCI Comments at 3-4; GCI Reply Comments at 3-4.

[372] GCI Comments at 3-4.

185. Those commenters that addressed the question of forbearance from applying Sections 216 and 217 agree with our tentative conclusion.[373] NYNEX argues that enforcement of these sections is consistent with the intent of Congress to give consumers some measure of protection against possible carrier abuses and to provide the public with adequate safeguards without jeopardizing the development of a competitive market.[374]

(2) *Discussion*

186. We conclude that the public interest will not be served if we forbear from enforcing Sections 206, 207, and 209. These sections make carriers liable for monetary damages to any party aggrieved by a violation of the Communications Act, and guarantee the right of successful complainants to pursue the collection of damages either through the courts or the Commission. By prohibiting forbearance from Section 208, Congress intended that any potential violation of Section 201 or Section 202 could be redressed. Because Section 332 does not permit the Commission to forbear from enforcing Section 208, forbearing from enforcing those sections that provide the remedies for parties who successfully pursue a complaint would eviscerate the protections of Section 208. Without the possibility of obtaining redress through collection of damages, the complaint remedy is virtually meaningless. Therefore, it is in the public interest not to forbear from enforcing these sections against any CMRS provider.

187. We also conclude that the public interest will not be served if the Commission forbears from enforcing Sections 216 and 217. These sections merely extend the Title II obligations of CMRS providers to their trustees, successors in interest, and agents. The sections were intended to ensure that a common carrier could not evade complying with the Act either by acting through others over whom it has control or by selling its business. To assure that the congressional intent behind the decision not to permit forbearance from Sections 201, 202, and 208 is not frustrated, we conclude that we should not forbear from enforcing the obligations imposed by Sections 216 and 217 of the Act.

c. Sections 210, 212, 213, 215, 218, 219, 220, and 221

(1) *Background and Pleadings*

188. As we discussed in the *Notice*, Section 210 (Franks and Passes), Section 212 (Interlocking Directorates - Officials Dealing in Securities), Section 213 (Valuation of Carrier Property), Section 215 (Transactions Relating to Services, Equipment, and So Forth), Section 218 (Inquiries into Management), Section 219 (Annual and Other Reports), Section 220 (Accounts, Records, and Memoranda) and Section 221 (Special Provisions Relating to Telephone Companies) concern matters of Commission authority and specific obligations placed on carriers.[375] In the *Notice* we tentatively concluded that we should forbear from enforcing these provisions.

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[373] Mtel Comments at 17-18; NYNEX Comments at 21; Sprint Comments at 13.

[374] NYNEX Comments at 21.

[375] Sections 222 (Competition Among Record Carriers) and 224 (Regulation of Pole Attachments) do not appear to apply to commercial mobile services, so a determination concerning forbearance is not required. *See Notice*, 8 FCC Rcd at 8001 (para. 65 n.87). BellSouth expressed agreement with the Commission in its comments. BellSouth Comments at 30-31.

189. Several commenters assert that we should forbear from enforcing these sections.[376] Bell Atlantic argues that none of these provisions is necessary to ensure that service rates are just, reasonable, and non-discriminatory, and they are not needed in order to protect consumers.[377] GTE asserts that Sections 213, 215, 219, and 220 are recordkeeping, reporting, accounting, depreciation, and transactional filing requirements that should be forborne for the same reasons that tariff filing requirements should also be forborne.[378] GTE also contends that the management and merger limitations in Sections 212, 218, and 221 are irrelevant in a competitive market.[379]

190. Bell Atlantic contends that all of these sections were intended to impose a level of oversight that was deemed appropriate for regulating monopoly phone companies, but which is unwarranted for the competitive, multi-player mobile services market. Bell Atlantic and other commenters argue that these sections have nothing to do with rates but rather burden carriers with paperwork that would be irrelevant once tariffs are not accepted.[380] CTIA asserts that these requirements are inconsistent with a regulatory regime which refrains from regulating rates.[381] Further, CTIA, Mtel, and Motorola argue that it is not necessary and is unreasonably costly in a competitive market closely to oversee management, including the monitoring of directorship positions, technical developments, annual reports, and specific accounting records, because marketplace forces will ensure that firms perform efficiently.[382]

191. California urges the Commission not to forbear from prescribing accounting systems under Section 220 for dominant providers of commercial mobile radio services in order to guard against anti-competitive abuses by such providers.[383] California alleges that with many of the dominant carriers receiving PCS licenses, proper accounting systems should be prescribed in order to deter cross-subsidy and other anti-competitive behavior.[384]

(2) ***Discussion***

192. We note that the Commission infrequently exercises its authority under most of these sections for carriers lacking market power. For example, the Commission has imposed no accounting requirements on non-dominant wireline carriers pursuant to Section 220. In addition, non-dominant wireline carriers have been exempted from filing forms required of dominant wireline carriers pursuant to Section 219. Therefore, none of these provisions places any

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[376] AMSC Comments at 5; AMSC Reply Comments at 2; Bell Atlantic Comments at 27; BellSouth Comments at 30-31; CTIA Comments at 35-36; CenCall Comments at 11-12; GCI Comments at 3; GTE Comments at 17; GTE Reply Comments at 8; In-Flight Comments at 2-3; Mtel Comments at 17-18; Motorola Comments at 18-19; Pacific Comments at 17; RCA Comments at 6-7; Southwestern Comments at 29; Sprint Comments at 12-13; TDS Comments at 20; Telocator Comments at 20; TRW Comments at 31.

[377] Bell Atlantic Comments at 26.

[378] GTE Comments at 17.

[379] *Id.*

[380] Bell Atlantic Comments at 27; CTIA Comments at 35.

[381] CTIA Comments at 35.

[382] *Id.* at 35-36; Mtel Comments at 18; Motorola Comments at 18-19.

[383] California Comments at 8.

[384] *Id.*

unwarranted or burdensome duty upon CMRS providers. Furthermore, we find that the three-pronged statutory test justifying forbearance is not satisfied. While these sections have no direct effect on the reasonableness of rates or practices, they may be necessary for the protection of consumers if some market failure occurs. If such powers were needed, and the Commission had earlier determined to forbear from exercising those powers, the Commission would first have to initiate a rule making proceeding in order to regulate under these sections. There is no countervailing public interest reason to justify our limiting our ability to act if the need arises. Before forbearing, we must determine that the provision is not necessary to protect against unreasonable rates, and to protect consumers, and that forbearing from enforcing the provision is consistent with the public interest. No one has shown that forgoing our authority to act under Sections 210, 213, 215, 218, 219, 220, and 221, will promote competitive market conditions and enhance competition among CMRS providers, which the statute makes part of the public interest analysis of the third prong of the public interest test.

193. Although we proposed to forbear from exercising our authority under Sections 210, 212, 213, 215, 218, 219, 220, and 221 in the *Notice*, upon further review we find that we should only forbear from regulating pursuant to Section 212. Section 210 is unrelated to Commission authority or regulatory obligations. Rather, it allows common carriers to issue franks and passes to their employees, and to provide the Government with free service in connection with preparation for the national defense. The remaining sections, other than Section 212, are primarily reservations of Commission authority, which the Commission may exercise, as necessary. Section 213 authorizes the Commission to make a valuation of all or of any part of the property owned or used by any carrier. Section 215 gives the Commission the authority to examine carrier activities and transactions likely to limit the carrier's ability to render adequate service to the public, or to affect rates.[385] Section 218 authorizes the Commission to inquire into the management of the business of the carrier. Section 219, *inter alia*, authorizes the Commission to require annual reports from carriers.[386] Section 220 gives the Commission the discretion to prescribe the forms of accounts, records, and memoranda to be kept by carriers and also includes depreciation prescription provisions. Section 221, *inter alia*, gives the Commission the power to review proposed consolidations and mergers of telephone companies, and also describes the jurisdiction of the states when an exchange area crosses state lines. Although we will not exercise our authority to require annual reports or to prescribe forms of accounts, relinquishing our power to so act is unnecessary. To date, the Commission has not imposed the reporting requirements listed here on common carriers who are now being classified as CMRS providers. Thus, reservation of these powers should have no adverse impact on competitors.

194. In assessing whether to forbear from Sections 210, 212, 213, 215, 218, 219, 220, and 221 in the case of cellular carriers, we note that the cellular market is not yet fully competitive. Therefore, we have decided to initiate a proceeding in the near future to determine what information collection requirements should apply to cellular carriers. These requirements would be intended to ensure that competition in the cellular marketplace continues to develop in a manner that results in reasonable pricing and the absence of unreasonably discriminatory practices in the pricing and delivery of cellular services. We also wish to underscore our view that a variety of factors (*e.g.*, the advent of personal communications services) will work to enhance competition in the cellular marketplace in the near term. Nonetheless, we believe it is

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[385] Section 215 is also one source of our authority to establish our program of equipment registration. *See NCUC I.*

[386] *See* Section 43.21(a) of the Commission's Rules, 47 C.F.R. § 43.21(a).

prudent for the Commission to gather sufficient data to enable us to confirm our expectations regarding the role competition will play with regard to cellular services.[387]

195. The issues we expect to raise in the proceeding include, *inter alia*: (1) the type of information to be collected; (2) the frequency with which periodic reports of information should be submitted to the Commission; (3) whether these reporting requirements should apply to all cellular carriers and all cellular markets; and (4) policies that should apply to any asserted confidentiality applicable to information submitted.

196. Section 212 does impose an obligation upon carriers. Section 212 empowers the Commission to monitor interlocking directorates, *i.e.*, the involvement of directors or officers holding such positions in more than one common carrier. A person seeking to become an officer in two or more carriers must apply to the Commission and must provide "a full explanation of the reasons why grant of the authority sought will not adversely affect either public or private interests . . . . [and] address whether grant of the permission requested could result in anticompetitive conduct."[388]

197. Forbearance from enforcing Section 212 will reduce regulatory burdens without adversely affecting CMRS rates. Section 212 was originally adopted to prevent interlocking directors and officers from engaging in such practices as price fixing. The antitrust concerns that Section 212 was designed to address are already addressed through other Title II provisions[389] or by the antitrust laws.[390] Thus, regulation under Section 212 is not necessary to protect consumers. Finally, forbearance is in the public interest because it eliminates unnecessary filing burdens that could otherwise impose additional costs upon CMRS providers.

d. Sections 223, 225, 226, 227, and 228

(1) *Background and Pleadings*

198. As we stated in the *Notice*, Sections 223 (Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications), 225 (Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals), 226 (Telephone Operator Consumer Services Improvement Act (TOCSIA)), 227 (Restrictions on the Use of Telephone Equipment (auto dialing, telemarketers)) and 228 (Regulation of Carrier Offering of Pay-Per-Call Services) are provisions of more recent origin offering explicit protections to consumers. We sought comment on whether we should forbear from applying any of these provisions to CMRS providers.

199. NYNEX, Mtel, and other commenters argue generally that enforcement of Sections 223, 225, 226, 227, and 228 is consistent with the intent of Congress to provide consumers with some measure of protection against possible carrier abuses, and assert that application of these safeguards will provide the public with adequate safeguards without jeopardizing the

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[387] We will also, as required by the statute, conduct an annual review of the CMRS marketplace to determine whether the level of Title II regulation is appropriate. *See* para. 143 & note 300, *supra*.

[388] Section 62.11 of the Commission's Rules, 47 C.F.R. § 62.11.

[389] *See, e.g.*, Communications Act, §§ 201(b), 221, 47 U.S.C. §§ 201(b), 221.

[390] *See, e.g.*, Clayton Act, § 9, 15 U.S.C. § 19, which governs interlocking directorates.